IN THE

Supreme Court of the United States

No. 75-1636

DAVID UNGAR, *et al.*
and
JOHN RADER, *et al.*,
Petitioners,
v.
DUNKIN' DONUTS OF AMERICA, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (App. A, A.1-A. 151) is reported at 68 F.R.D. 65; 1975-1 Trade Cas. ¶ 60,204 (E.D. Pa. 1975). The opinion of the Court of Appeals for the Third Circuit (App. D, A.176-A. 209) is reported at 1976-1 Trade Cas. ¶ 60,763 (3d Cir. 1976).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The court of appeals ruled that a sale on condition, the threshold element of an unlawful antitrust tying arrangement, requires a showing that buyers' purchases of the allegedly tied item were coerced and not voluntary. The court further ruled that two alternate modes of proof of conditioning, on which the district court expressly premised class action certification, were not adequate: (1) a showing that the seller had a "policy to persuade" buyers to purchase the allegedly tied item; or (2) a showing that many buyers in fact purchased the item.

The question presented is whether the court of appeals correctly applied principles of antitrust law regarding the proof needed to establish a sale on condition and, therefore, correctly reversed the class action certification.

STATUTE AND RULE INVOLVED

The pertinent provisions of section 1 of the Sherman Act, 15 U.S.C. § 1, and Rule 23 of the Federal Rules of Civil Procedure are set forth in the Petition (Pet.) at pp. 3-4.

STATEMENT

Petitioners seek review of a judgment of the Court of Appeals for the Third Circuit which, on an interlocutory appeal, unanimously reversed a class action certification of several antitrust tying claims. The district court's certification was expressly premised on its interpretation of the requirements for proof of an unlawful tying arrangement. The court of appeals rejected that interpretation and, accordingly, reversed.

These suits were brought by 14 present and former franchisees of Dunkin' Donuts against the franchisor. Petitioners individually assert damages in excess of three million dollars on a variety of alleged antitrust and other claims. Petitioners also seek to represent a class of all present and former Dunkin' Donuts franchisees.

Respondents operate a coffee and doughnut franchising system under the Dunkin' Donuts trademark. Respondents offer to lease franchisees the land and building for a shop, as well as to sell them the equipment needed to operate the shop. Respondents do not sell the supplies or ingredients for the products sold by franchisees under the Dunkin' Donuts trademark. To assure uniform quality, however, respondents maintain a quality control system and require that suppliers meet certain standards.

Petitioners alleged that respondents had unlawfully tied the use of their trademark to the purchase by franchisees of equipment, signs and supplies and the lease of real estate. The class action certification before the court of appeals concerned these tying claims.[1] Class actions with respect to another antitrust claim and a contractual claim were certified by the district court, but these certifications were not dealt with by the court of appeals (A. 185).

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[1] The district court made no findings with respect to the "existence or non-existence of the alleged tying violations." (A. 133). Thus, references in the petition to "violations . . . evidenced by the district court's findings" (Pet. 31) are inaccurate.

The pivotal issue in this case concerns the kind of evidence which is required to prove the existence of a tie, *i.e.*, that use of the Dunkin' Donuts trademark was conditioned upon franchisees' acceptance of the real estate, equipment, signs and supplies which were offered.[2] The court of appeals approved "the so-called doctrine of individual coercion which, broadly stated, requires that a plaintiff alleging an illegal tie-in establish that his acceptance of the tied item was coerced and not voluntary" (A. 189). The district court, however, had ruled that such proof was unnecessary. Instead, that court believed it would be sufficient to prove "either that the franchisor had a policy to persuade the franchisees to accept the allegedly tied items, or that a large number of franchisees had, in fact, accepted them" (A. 180).

The district court acknowledged that it could not have properly certified a class without rejecting the individual coercion doctrine, since otherwise "individual questions would clearly have predominated" over common questions (A. 131). Because neither of the alternate showings the district court embraced required individualized proof, it concluded that common issues predominated.

The district court asserted that this Court "has not set forth a coercion requirement in the tying cases" (A. 46), although it acknowledged that other lower federal courts had required proof of coercion. The

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[2] Petitioners, as the court of appeals noted, "do not rely on the terms of their franchise agreements" with respect to any of the tying claims at issue (A. 184). The petition thus raises no issue regarding certification of class actions when common written agreements contain alleged tie-ins. *Cf. Chicken Delight, Inc.* v. *Harris,* 412 F.2d 830 (9th Cir. 1969).

court supported its reading of this Court's opinions by a "synthesis" of the "use-coercion dialogue" it perceived in those opinions and concluded, ultimately, that it "is not necessary to prove coercion in order to establish an illegal tie; concomitantly, there can indeed be a 'voluntary,' yet illegal, tie" (A. 79).

The court of appeals disagreed with the district court's "novel approach to the law of tying" (A. 191). The court expressed "surprise" at the statement that this Court had not required a showing of coercion to prove an illegal tie-in (*id.*). To the contrary, the court of appeals concluded after its own review of the principal decisions of this Court, "coercion has been and continues to be an integral part of the law of tying as established by the Supreme Court" (A. 200). Furthermore, the court noted, its view "is consistent with an impressive line of cases in other circuits" which have required proof of coercion (*id.* n. 9).

Having concluded that a showing of coercion is necessary to prove an illegal tie-in, the court of appeals examined "the particular factual complex" at issue (A. 200) to determine whether either of the alternate modes of proof adopted by the district court is an adequate substitute for a showing of individual coercion of franchisees. The court concluded, from "a pragmatic and prudential, as well as jurisprudential, view" (*id.*), that neither mode of proof would suffice.

The court reasoned that "a plaintiff must establish in some . . . way that a tie-in was involved and not merely the sale of two products by a single seller" (A. 204). The district court's approval of a showing of a "policy to persuade" would, as a practical matter,

mean that proof of mere "salesmanship in connection with the sale of two products by a seller-franchisor" would be sufficient (*id.*). Thus, a tie-in could be found even if the buyer had simply made two voluntary purchases from the same seller. Similarly, the court concluded, the other mode of proof adopted by the district court—purchases by a large number of buyers of two products from a single source—begs the question whether the purchases were the result of an illegal tie-in or simply lawful salesmanship (A. 205-06).[3]

The court of appeals found an additional pragmatic reason "in the context of a franchise class action" (A. 204) for rejecting the alternate modes of proof which the district court approved. Any seller will have "a firm and resolutely enforced policy to persuade buyers to buy what is offered for sale" (A. 205). Similarly, a large number of franchisees may be expected to accept the items offered by the franshisor.[4] "Thus, inherent in *any* franchise arrangement are the factors the district court considered sufficient to establish prima facie liability, in class action form, for a tie-in" (A. 205) (emphasis in original).

[3] Petitioners characterize the purchases in question as being on uneconomic and burdensome terms, and repeatedly assert that franchisees could obtain equipment from suppliers other than Dunkin' Donuts for substantially less (Pet. 13 n. 10, 18, 22). The district court made no finding on this issue, nor could it appropriately have done so, particularly since there was no evidence to support the assertion. Thus, the district court was careful to refer to petitioners' claim as an allegation (A. 12) and a "contention" (A. 102).

[4] As the court observed, "[o]ne of the primary attractions of the franchise system to franchisees is that the franchisor offers a package deal including many, if not all, of the items necessary to operate the business" and permits the franchisee to begin his business "at a relatively modest investment" (A. 205).

The "stark, routine application" (*id.*) of the district court's ruling, in other words, would produce a certified class action in every franchising case involving the issue whether the sales were "conditioned," and would permit imposition of antitrust liability without proof that the allegedly tied purchases were involuntary. The court of appeals refused to endorse such a radical departure from settled principles of antitrust law in order to facilitate certification of class actions (A. 209). It therefore concluded that the district court should not have rejected the individual coercion doctrine in favor of the alternate modes of proof and that the class action certification, expressly premised on that determination, "cannot stand" (A. 191).

ARGUMENT

The court of appeals' decision was completely consistent with principles regarding proof of conditioning which have been long settled by this Court and regularly applied by the lower federal courts. Petitioners assert that the court of appeals has added "a separate and distinct element termed 'individual coercion' " (Pet. 3) to the requirements, established by this Court, which plaintiffs must prove to establish a *per se* illegal tying arrangement. Petitioners have misread the court of appeals' decision. The court did not add a new element to the definition of a tying offense. It simply applied the standard requirement for proof of the conditioning element of a tie-in, *i.e.*, that there was "an agreement by a party to sell one product but only on condition that the buyer also purchase a different (or tied) product." *Northern Pacific Ry. Co.*

v. *United States,* 356 U.S. 1, 5 (1958).[5] Petitioners' suggestion that this established requirement should be relaxed in order to facilitate a favorable class action ruling was properly rejected.

I. The Decision of the Court of Appeals Correctly Applied This Court's Decisions in Tying Cases and Does Not Conflict with Decisions of Other Lower Federal Courts

The decisions of this Court, as the court of appeals recognized, have consistently held that a sale "on condition" is established by a showing that a buyer is required, coerced, or forced to purchase the tied product, but not by a mere showing that two products were offered and purchased. In *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 605, 614 (1953), the Court observed (emphasis supplied):

> By conditioning his sale of one commodity on the purchase of another, a seller *coerces* the abdication of buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open market. . . . The common core of the adjudicated unlawful tying arrangements is the *forced* purchase of a second distinct commodity with the desired purchase of a dominant "tying product."

Similarly, this Court spoke in *Northern Pacific* of tying agreements which were "exacted" or "impose[d]" (356 U.S. at 5, 6) and, in at least two other cases, of agreements which were "forced." *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495, 503-04 (1969); *United States* v. *Loew's, Inc.,* 371

[5] The other elements of a *per se* illegal tie-in—degree of economic power and impact on interstate commerce (356 U.S. at 6-7)—were not at issue on the interlocutory appeal.

U.S. 38, 39 (1962). Moreover, this Court made it plain in *Northern Pacific* that "where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." 356 U.S. at 6 n.4.

There is, moreover, no conflict between the decision of the court of appeals and decisions of other courts of appeals, which have consistently recognized that a showing of coercion, rather than a voluntary purchase, is necessary to prove conditioning. For example, the Second Circuit held that "there can be no illegal tie unless unlawful coercion by the seller influences the buyers' choice." *American Mfg. Mut. Ins. Co.* v. *American Broadcasting-Paramount Theatres, Inc.,* 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied,* 404 U.S. 1063 (1972). *See also Umphres* v. *Shell Oil Co.,* 512 F.2d 420, 422-23 (5th Cir. 1975); *Capital Temporaries, Inc.* v. *The Olsten Corp.,* 506 F.2d 658, 662 (2d Cir. 1974)[6]; *Broussard* v. *Socony Mobil Oil Co.,* 350 F.2d 346, 352 (5th Cir. 1965); *McCullough Tool Co.* v. *Well Surveys, Inc.,* 343 F.2d 381, 408 (10th Cir. 1965); *Osborn* v. *Sinclair Refining Co.,* 286 F.2d 832, 836 (4th Cir. 1960), *cert. denied,* 366 U.S. 963 (1961); *Binks Mfg. Co.* v. *Ransburg Electro-Coating Corp.,* 281 F.2d 252, 259 (7th Cir. 1960); *American Securit Co.* v. *Shatterproof Glass Corp.,* 268 F.2d 769, 777 (3d

[6] The Second Circuit has noted that "[a]n unremitting policy of tie-in . . . constitutes the requisite coercion under *Capitol Temporaries.*" *Hill* v. *A-T-O, Inc.,* 1976-1 Trade Cas. ¶ 60,873 at 68,825 (2d Cir. 1976). In *Hill,* the principal issue in the instant litigation was conceded: there was an "admitted tie" since it was "undisputed" that defendant would never permit the consumer to obtain the tying product without purchasing the tied item. *Id.* at 68,824, 68,825.

Cir.), *cert. denied,* 361 U.S. 902 (1959).[7] Petitioners' suggestion that decisions in the lower courts have produced "confusing and conflicting" results (Pet. 29) is thus without basis.[8]

One district court has, in fact, granted summary judgment in favor of Dunkin' Donuts precisely because the plaintiff-franchisee was "not able to demonstrate some element of coercion to establish an illegal tying agreement" with respect to the same allegedly tied items as are involved in this case. *E.B.E., Inc.* v. *Dunkin' Donuts, Inc.,* 387 F. Supp. 737, 738 (E.D. Mich. 1971). And two trial courts, as the court of appeals noted (A. 194 n. 7), have applied the individual coercion rule "to deny class certification to identical tying claims against Dunkin' Donuts." *Greene* v. *Dunkin' Donuts, Inc.,* C.A. No. 3-5820-D (N.D. Tex., Aug. 29, 1973); *Zezulka* v. *Dunkin' Donuts, Inc.,* Wake

[7] Numerous district courts have refused to certify class actions with respect to claims similar to those presented here because individual issues, including the issue whether the sale was conditioned or coerced, predominated over common issues. *See, e.g., Plekowski* v. *Ralston Purina Co.,* 1975-2 Trade Cas. ¶ 60,411 (M.D. Ga. 1975); *Smith* v. *Denny's Restaurants, Inc.,* 62 F.R.D. 459 (N.D. Cal. 1974); *Halverson* v. *Convenient Food Mart, Inc.,* 1975-1 Trade Cas. ¶ 60,254 (N.D. Ill. 1974); *Thompson* v. *T.F.I. Companies, Inc.,* 1974-2 Trade Cas. ¶ 75,215 (N.D. Ill. 1974); *Bogosian* v. *Gulf Oil Corp.,* 62 F.R.D. 124 (E.D. Pa. 1973); *Seligson* v. *The Plum Tree, Inc.,* 61 F.R.D. 343 (E.D. Pa. 1973); *Abercrombie* v. *Lum's, Inc.,* 345 F. Supp. 387 (S.D. Fla. 1972); *In re 7-Eleven Franchise Antitrust Litigation,* 1972 Trade Cas. ¶ 74,156 (N.D. Cal. 1972).

[8] Of the seven cases petitioners cite for this contention, the alleged tie-in was contained in a written agreement in four. *Chicken Delight, Inc.* v. *Harris,* 412 F.2d 830 (9th Cir. 1969); *Aamco Automatic Transmissions* v. *Tayloe,* 1975-2 Trade Cas. ¶ 60,666 (E.D. Pa. 1976); *Hawkins* v. *Holiday Inns, Inc.,* 1975 Trade Cas. ¶ 60,153 (W.D. Tenn. 1975); *Falls Church Bratwursthaus* v. *Bratwursthaus Mgmt. Corp.,* 354 F. Supp. 1237 (E.D. Va.

Cy. Gen. Ct. of Justice, N. Car., No. 73CVS 2680 (Sup. Ct. Div., April 25, 1974).[9]

II. The Decision of the Court of Appeals Was Faithful to Principles of Antitrust Law

The court of appeals' ruling properly adhered to principles of antitrust law which underlie the decisions of this Court and the lower federal courts. The court of appeals recognized that permitting proof of a "policy to persuade" or of purchases by large numbers of buyers to substitute for a showing of coercion would interfere with legitimate efforts by sellers to sell their products, and thereby inhibit competition. The court observed, correctly, that "[t]he basic assumption inherent in the district court's formulation [A. 81] is 'that persuasion or influence may be the virtual equivalent of coercion where there is an unequal relationship between the parties, as there is here'" (A. 207). The court of appeals rejected that assumption, pointing out that (A. 207-08)

1973). As noted above, petitioners do not rely on a written agreement here. Two other cases arose in the Third Circuit, where any confusion or conflict generated by the opinion of the district court below has been eliminated by the decision of the court of appeals. *Sommers* v. *Abraham Lincoln Federal Savings and Loan Assn.,* 1975-1 Trade Cas. ¶ 60,280 (E.D. Pa. 1975); *Herrmann* v. *Atlantic Richfield Co.,* 65 F.R.D. 585 (W.D. Pa. 1974). The remaining decision recognized that a showing of coercion was necessary to prove an illegal tie-in, but concluded, in a one-page order, that the plaintiffs' allegation of an "overall pattern of coercive behavior" created a sufficiently common issue to warrant a conditional class certification pending completion of discovery on the class action issue. *In re Clark Oil and Refining Corp.,* 1974-1 Trade Cas. ¶ 74,880 at 95,971-72. (E.D. Wis. 1974).

[9] Both orders are unpublished. They were reproduced at pages 1717a-18a of the appendix in the court of appeals.

> . . . [i]t is difficult to conceptualize a more damning denunciation of the private free enterprise system than the thesis that there is no distinction [between coercion and persuasion] where there is an unequal relationship between buyer and seller.

Outlawing persuasion would undermine the antitrust laws because their "purpose . . . is to stimulate economic competition, the essence of which is the presence of many competing sellers; salesmanship—the art of persuasion and influence—is inherent in competition among sellers." *See United States* v. *Loew's, Inc.*, 371 U.S. 38, 55 (1962); *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 6 n. 4 (1958); *United States* v. *Paramount Pictures*, 334 U.S. 131, 159 (1948).[10]

The court of appeals added that a departure from antitrust principles to correct alleged evils of the franchising system was not warranted. It pointed out that there was certainly "no Congressional expression of policy suggesting that franchising, per se, violates the letter or spirit of the antitrust laws. On the contrary, we are conscious of a general Congressional approbation of the franchising system, particularly in light of the opportunity it provides for small businesses" (A. 208). The court was quite properly unwilling to make a "massive judicial pronouncement"—consistent with neither the decisions of this Court nor Congressional policy—which would "threaten the vitality of the franchise system in our economy" (A. 209). The court thus had the soundest of reasons for reversing the district court.

[10] The court's insistence that the antitrust laws require recognition of the distinction between persuasion and coercion also reflects the intent of Congress, as indicated in the Automobile Dealer Franchise Act of 1956, 15 U.S.C. §§ 1221-1225. Congress imposed a duty on automobile manufacturers and dealers to act in "good faith" in connection with their franchise agreements. The "good faith" standard required each party to refrain from "coercion" and "intimidation." 15 U.S.C. § 1221(e). However, the statute specifically provided that "recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

III. Principles of Antitrust Law Should Not Be Distorted in Order To Facilitate Class Actions

Finally, no reason for review is presented by petitioners' contention that the "decision of the Court of Appeals will act as an effective deterrent to private enforcement of the antitrust laws" by eliminating the possibility of "franchise tie-in class actions where the complained of practices are not written in the franchise documents" (Pet. 23). Petitioners greatly exaggerate both the effect of the court of appeals' decision and the proper role of class actions in enforcing the antitrust laws.

There is little doubt that, under petitioners' theory, the role of class actions in tying cases would be greatly expanded to the point where certifications would be "routine" (A. 205). On the other hand, it is evident that, under the court of appeals' ruling and the impressive array of lower court decisions which have rejected class actions in circumstances similar to those present here, a certification is unlikely to be granted when the element of conditioning is disputed. The court of appeals' decision does not, however, foreclose all class actions against franchisors in tying cases. The decision was limited to the "circumstances of this case" (A. 209). It does not purport to prevent prospective class action plaintiffs from demonstrating, in any case, that common issues *predominate* over individual issues. For example, the principal dispute may involve ele-

ments of a tying arrangement, other than conditioning, with respect to which the issues may be common. Class action determinations properly are made on a case-by-case basis, and there is nothing in the court of appeals' decision to suggest that it has announced an incorrect standard for reaching those determinations.

In any event, private enforcement of the antitrust laws does not rest exclusively on the availability of class actions. Congress has provided other incentives to private attorneys general, specifically treble damage recovery and the award of attorneys' fees. *See* 15 U.S.C. § 15. This combination of incentives, unique to antitrust enforcement, renders unlikely the prospect of diminished private antitrust enforcement. In this case, for example, the named plaintiffs have individually asserted treble damages exceeding three million dollars. That should provide adequate incentive to the plaintiffs, other plaintiffs who may seek to join with them and assert additional claims, and their counsel to act vigorously as private attorneys general.[11]

The most significant response to petitioners, however, is that acceptance of their position regarding class actions would require a change in substantive antitrust law with dramatic implications. If the conditioning element of a tying violation could be proven by a showing that the seller had a "policy to persuade" (or that large numbers of purchasers bought the allegedly "tied" item), then, as the court of appeals observed, a class action certification would automatically follow. But settled antitrust principles plainly require more than a showing of a "policy to persuade"

[11] Counsel for petitioners has stated that, if respondents "want to have individual trials for each franchisee, well, we'll give them individual trials." *Nation's Restaurant News*, Apr. 12, 1976, at 38.

or large numbers of purchases to prove that sales were made on condition. Therefore, the certification was properly reversed.

There can be no doubt, as the Rules Enabling Act indicates, that Rule 23 was not intended and should not be employed to effect changes in substantive law. *See* 28 U.S.C. § 2072(a). Yet that is the precise result which petitioners urge on this Court. Such a contention does not warrant plenary consideration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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